SEKITAR ENGINEERING SDN. BHD.

v.

KONSORTIUM BERSEKUTU SDN. BHD. & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[CIVIL SUIT NO. D2-C23-2206-87]
28 DECEMBER 1988

CIVIL PROCEDURE: *Application for summary judgment - Appeal against Senior Assistant Registrar's decision dismissing application - Claim on work done and goods supplied - Alternatively claim on dishonoured cheque - Whether plaintiff entitled to summary judgment on the cheque - Question of failure of consideration.*

This was an appeal against the decision of the Senior Assistant Registrar ordering that the plaintiff's application for summary judgment against the defendants be dismissed.

The plaintiff was a sub-contractor in respect of a project while the 1st defendant was the main contractor and the 2nd defendant was the guarantor who had guaranteed the repayment of any amount due to the plaintiff from the first defendant. The plaintiff's claim against the defendants is for an outstanding balance sum of RM175,337.75 in respect of building and installation works done and goods supplied by the plaintiff to the 1st defendant. Alternatively, the plaintiff is claiming against the 1st defendant, the drawer of a cheque for the sum of RM50,000 which cheque was dishonoured upon presentation and due notice of dishonour had been given to the 1st defendant.

The defendants averred that the plaintiff had abandoned the project for which they were engaged as sub-contractor as a result of which the 1st defendant had incurred additional expenses and claimed they had a valid counterclaim. The defendants also claimed that the plaintiff had done various variations to the work which were not approved or approved only in part for which the defendants were not liable to pay. The 1st defendant also claimed that payment was stopped on the said cheque when the first defendant realised that the plaintiff had included unauthorised variations in their claim.

Counsel for the plaintiff asked for summary judgment to be entered against the defendants on the said cheque, that is, RM50,000 while conceding that there were triable issues in respect of the remainder of the claim.

Held:

[1] It is clear that the cheque in the present case was dishonoured. Notice of dishonour had been given to the 1st defendant. The 1st defendant is liable to pay the plaintiff on the dishonoured cheque.

[2] The suggestion that there was failure of consideration is groundless as the said cheque was issued by the 1st defendant for payment of sums due to the plaintiff for the original contract works done by the plaintiff.

[Appeal allowed with costs.]

Cases referred to:

Plunkett & Anor. v. Barclays Bank Ltd. [1936] 2 KB 107
Fielding & Platt Ltd. v. Najjar [1969] 2 All ER 150

Legislation referred to:
Bills of Exchange Act 1949, s. 47(1)

Other source referred to:
Supreme Court Practice 1985, Vol. 1, p. 142

For the plaintiff/applicant - Kenneth Tie; M/s. T.C. Chong & Rakan-Rakan
For the defendants - Balwant Singh; M/s. Balwant Singh Sidhu & Co.

JUDGMENT

Zakaria Yatim J:

This is an appeal against the decision of the Senior Assistant Registrar given on 3 October 1988 ordering that the plaintiff's application for summary judgment against the defendants be dismissed.

The plaintiff is a sub-contractor in respect of a project known as "Extension to Existing Ground Floor of the EPF building" in Petaling Jaya. The first defendant is the main contractor and the second defendant is a guarantor who, by a letter of guarantee dated 27 November 1986, guaranteed the repayment of any amount due to the plaintiff from the first defendant to the extent of RM181,337.75.

The plaintiff's claim against the defendants is for an outstanding balance sum of RM175,337.75 in respect of building and installation works done and goods supplied by the plaintiff to the first defendant at the request of the first defendant in connection with the said project. Alternatively the plaintiff is claiming against the first defendant, the drawer of a cheque for a sum of RM50,000. In the statement of claim, the plaintiff averred that the first defendant, in purported settlement of the amount due on 20 December 1986 drew a cheque bearing No. 508802 upon Bank of Commerce for the said sum of RM50,000. According to the plaintiff, the cheque was presented for payment but was dishonoured upon presentation. The plaintiff had given due notice of the dishonour to the first defendant.

The defendants, in their statement of defence, denied that they were indebted to the plaintiff in the sum of RM175,337.75. They averred that all works done and goods supplied by the plaintiff had been paid for. The defendants also averred that the plaintiff had abandoned the project for which they had been engaged as a sub-contractor by the first defendant inspite of warnings, given orally and in writing by the first defendant. According to the defendants, up to the date of abandonment, the first defendant had paid all progress payments due to the plaintiff. The defendants further averred that the plaintiff had done various variations to the works. It was expressly agreed between the parties that the first defendant would only pay the plaintiff for variations approved by the architect. The defendants stated that there were a number of variation orders, which had not been approved or approved only in part. The first defendant averred that they were not liable to pay the plaintiff for the portion of works not approved by the architect as the first defendant itself would not be paid by the principal. The first defendant stated that as a result of the abandonment by the plaintiff, the first defendant had incurred additional expenses and claimed that they had a valid counterclaim against the plaintiff. In their counterclaim the defendants averred that if the plaintiff had completed the outstanding works as scheduled, it would have cost the first defendant only RM134,535.75. However, as a result of the abandonment, the first defendant had to incur a sum of RM232,147.10, thus causing the first defendant a loss of RM97,610.35. The first defendant's claim against the plaintiff is for the sum of RM97,610.35 as well as for damages for breach contract and costs.

Mr. Kenneth Tie, Counsel for the plaintiff asked for summary judgment to be entered against the defendants on the said cheque, that is, RM50,000. He conceded that there were triable issues in respect of the remainder of the plaintiff's claim.

The only issue to be considered, therefore, is whether the plaintiff is entitled to summary judgment on the said cheque in the sum of RM50,000.

The plaintiff in their affidavit affirmed on 29 December 1987 averred that the said cheque was issued by the first defendant to make payment to the plaintiff. A copy of the said cheque is exhibited to the affidavit. In the exhibit it is clear that the cheque was drawn by the first defendant on 20 December 1986 for a sum of RM50,000 in favour of the plaintiff. According to the plaintiff the cheque was duly presented for payment but was dishonoured. A copy of the slip was returned and the reason stated therein is "Refer to drawer". The first defendant in its affidavit affirmed on 28 April 1988 averred that payment was stopped on the said cheque as the first defendant realised that the plaintiff had included unauthorised variations in their claim.

The words "Refer to drawer" mean a statement by the bank to this effect: "We are not paying; go back to the drawer and ask why." or else "go back to the drawer and ask him to pay." *Plunkett & Anor. v. Barclays Bank Ltd.* [1936] 2 KB 107 at 120. Section 47(1) of the Bills of Exchange Act 1949 states that a bill is dishonoured by non-payment when it is duly presented for payment and payment is refused or cannot be obtained. It is clear therefore that the cheque in the present case was dishonoured. According to the plaintiff notice of dishonour had been given to the first defendant.

The first defendant is liable to pay the plaintiff on the dishonoured cheque. *Fielding & Platt Ltd. v. Najjar* [1969] 2 All ER 150 at 152 Mr. Balwant Singh, Counsel for the defendants suggested that there was failure of consideration. I find the suggestion groundless. The said cheque was issued by the first defendant for payment of sums due to the plaintiff for the original contract works done by the plaintiff. See the plaintiff's affidavit affirmed on 24 May 1988.

The plaintiff is therefore entitled to summary judgment on the dishonoured cheque. See the *Supreme Court Practice* 1985, Vol. 1, p. 142. See also *Fielding v. Najjar, supra.*

In the circumstances I allow the plaintiff to enter summary judgment in the sum of RM50,000 in respect of the dishonoured cheque and order that the remainder of the plaintiff's claim be decided at the trial. The defendants will pay the costs of this appeal to the plaintiff.

Also found at [1989] 1 CLJ 1123